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JUDICIAL DISCRETION, SENTENCING GUIDELINES, AND LESSONS FROM MEDIEVAL ENGLAND, 1066-1215

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INTRODUCTION

It would be an understatement to say that judicial sentencing discretion is in a state of flux; turmoil is more appropriate. In recent years Congress has laid siege to the traditional sentencing discretion of United States federal district court judges. Two recent enactments highlight Congress' move to restrict the ability of the federal judiciary to tailor punishments for individual criminals. But the courts have reacted in this battle, which at its core is a debate over the proper scope of judicial sentencing discretion. In two high profile decisions, *Blakely v. Washington*¹ and *United States v. Booker*,² the U.S. Supreme Court has resisted legislative action re-

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1. 124 S. Ct. 2531 (2004).
2. 125 S. Ct. 738 (2005).

stricting judicial sentencing discretion. Together, these events have sparked an important dialogue concerning the scope of federal judges' ability to mete out sentences.

The most commented on congressional action was the passage of the Feeney Amendment.³ A number of the Feeney Amendment's provisions limit judges' discretion during criminal sentencing under the Federal Sentencing Guidelines ("Guidelines"). Until *Booker*, the Guidelines themselves restricted judges' ability to craft a sentence that truly reflected the facts of each case. The debateless passage of the Feeney Amendment⁴ led to immediate cries that Congress was impinging on the independence of the judiciary in a way that was not only imprudent, but also contrary to the fundamental principles of the Constitution.⁵ As Judge Dickran Tevrizian recently articulated, "judicial independence is the ability of the courts to be free of inappropriate controls when engaging in judicial decision making."⁶

Congress also limited judicial discretion by significantly increasing the penalties for white-collar crimes—even though the body in charge of recommending changes in penalties had just increased them following the conclusion of a comprehensive six-year

3. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C. § 3742(g)(1)) [hereinafter Feeney Amendment].

4. Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295 (2004) (calling the Feeney Amendment a "drive-by rewrite of sentencing law"); Bruce Moyer, *FBA Urges Repeal of Sentencing Restrictions*, FED. LAW., Feb. 2004, at 10. See also David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 229 (2004).

5. See Bruce Moyer, *Judges Challenge Congress on Sentencing Authority*, FED. LAW., Oct. 2003, at 10 [hereinafter *Judges Challenge Congress*]. Moyer discusses the judicial reaction to the changes in the Guidelines and quotes one district court judge's reaction:

Judge John S. Martin Jr., writing in *The New York Times* in June, announced his intention to resign from the bench and declared, "For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been the hallmark of the American justice system."

Id. See also Michael S. Gerber, *A Judge's View*, LEGAL AFF., Mar.-Apr. 2004, at 74-75. Despite the title of the piece, Mr. Gerber is not a judge. See The Hill, *Beats and Bios*, at http://thehill.com/thehill/export/TheHill/About/michael_gerber.html.

6. *United States v. Mendoza*, No. CR 03-730 DT, 2004 U.S. Dist. LEXIS 1449, at *4-5 (C.D. Cal. Jan. 12, 2004). *Mendoza* is one of two cases other than *Booker* to address the constitutionality of the Feeney Amendment. In *Mendoza*, the court struck down the reporting requirements, but did uphold a number of the other provisions of the Amendment. See generally *id.* In *United States v. Detwiler*, 338 F. Supp. 2d 1166 (D. Ore. 2004), the court found the Guidelines, as modified by the Feeney Amendment, to be an unconstitutional violation of the separation of powers. *Id.* at 1182.

study.⁷

Late last term the U.S. Supreme Court, amidst important decisions about the Executive Branch's power⁸ and the Pledge of Allegiance,⁹ dropped a bombshell in the world of criminal law when it issued *Blakely*. The decision has been called "one of the most, if not *the* most, significant constitutional criminal procedure decisions in generations."¹⁰ Steven L. Chanenson was correct that *Blakely* was a significant decision, but he was also correct in his prophetic description of what was to come: "In fact, as of this writing in early August 2004, it may be better to think of *Blakely* as casting a dark storm cloud over virtually all determinate sentencing guideline systems. Which guidelines get the rain and which do not remains to be seen."¹¹ On January 12, 2005, after months of speculation as to the effect *Blakely* might have on the federal Guidelines, the U.S. Supreme Court answered that question when it issued *Booker*.¹²

In *Blakely*, the Court examined Washington State's determinate sentencing scheme.¹³ The scheme allowed judges to impose sentences beyond the statutory maximum for an offense if certain criteria were met.¹⁴ However, facts that could lead to a longer sentence did not have to be proved to a jury beyond a reasonable doubt.¹⁵ The Court invalidated Washington's scheme, saying that only on the basis of a jury's authorization may a judge impose a sentence beyond the sentence that was imposed by the legislature for that crime.¹⁶ To do otherwise violates a defendant's right to a jury trial under the Sixth Amendment.¹⁷

In *Booker*, the Court examined the Guidelines in light of *Blakely*.¹⁸ In an unusual majority opinion, authored in part by Justice Stevens and in part by Justice Breyer, the Court held that while the Sixth Amendment as interpreted in *Blakely* did apply to the

7. Kirby D. Behre & A. Jeff Ibrah, *Grid & Bear It*, CHAMPION, Aug. 2003, at 44 [hereinafter *Grid & Bear It*].

8. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

9. *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

10. Steven L. Chanenson, *Hoist With their Own Petard?*, 17 FED. SENT. REP. (forthcoming Oct. 2004) (manuscript at 3, on file with author).

11. *Id.* at 4.

12. *United States v. Booker*, 125 S. Ct. 738 (2005).

13. *Blakely v. Washington*, 124 S. Ct. 2531, 2435 (2004).

14. *Id.* at 2535.

15. *Id.*

16. *Id.* at 2536. *See also* Chanenson, *supra* note 10, at 1.

17. *Blakely*, 124 S. Ct. at 2540.

18. *United States v. Booker*, 125 S. Ct. 738, 746 (2005).

Guidelines, the Guidelines could be saved from nullification by severing certain mandatory provisions.¹⁹ The Court therefore upheld the Guidelines, but essentially de-clawed them by rendering the Guidelines “advisory.”²⁰ While the Guidelines remain an important factor for judges to consider in sentencing defendants, judges now have a renewed level of discretion in fashioning punishments for federal crimes.

Congress’ actions and the *Blakely* and *Booker* decisions have reinvigorated the debate over the preferred scope of judicial independence as most easily measured by discretion. The debate over the Feeney Amendment, and the Guidelines in general, focuses on the harshness and inequalities of criminal sentencing at the federal level. However, the debate is important for another reason: it exposes the inherent tensions in the distribution and separation of power between the legislative, executive, and judicial branches of government.

As noted by Justice Breyer in *Booker*: “Ours, of course, is not the last word: The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.”²¹

The turmoil created by *Blakely*, *Booker*, and the Feeney Amendment provides a perfect opportunity to step back and re-examine judicial discretion and the mechanisms that operate to constrain judges’ behavior. This Article is such an undertaking. More specifically, this Article will look at the very birth of the Common Law in medieval England between 1066 and 1215 for lessons that will help us better understand the optimal scope of judicial discretion, as well as the possible implications of Congressional action to define sentencing discretion.

Certain commonalities emerge when we reduce the two legal systems’ treatment of judicial discretion to a few key principles. I will show that both the medieval English monarchy and our current democracy struggled with defining the desirable scope of judicial discretion. The result is that in both systems there have been specific, reactionary limitations on discretion, as well as the implementation of more structural limitations on judicial discretion. Many of

19. *Id.*

20. *Id.* at 757, 767; *United States v. Wilson*, 350 F. Supp. 2d 910, 911 (D. Utah 2005) (“In light of the Supreme Court’s holding [in *Booker*], this court must now consider just how ‘advisory’ the Guidelines are.”).

21. *Booker*, 125 S. Ct. at 768.

the discretion-limiting structural mechanisms developed in medieval England between 1066 and 1215 remain an important part of the current U.S. federal legal system. Finally, I will show that in addition to having a general distrust of the judiciary, both the current Congress and medieval English kings show similar reactions to legal turmoil.

Part I provides an overview of judicial discretion under the current U.S. federal system by looking first at the inherent structural limitations on judicial discretion. In some cases, structural limitations operate to impact judicial discretion more than spot legislation passed by Congress.²² Part I then turns to a discussion of the controversy surrounding the federal sentencing guidelines. Here, I distill the current controversy over the Guidelines and inherent structural limitations down to a few key principles, and in doing so, afford the best opportunity to compare similarly extracted principles from medieval England's legal system.

Part II endeavors to uncover the scope of judicial discretion in medieval England between 1066 and 1215.²³ This Part discusses specific examples as a way of illustrating the broader principles and discretion-limiting mechanisms operating during that tumultuous period.

Part III directly compares the principles that emerge from the previous two sections. This Article will show that despite the differences—sometimes significant—between medieval England and the current U.S. federal system, important and valuable similarities are gleaned. The similarities highlight important lessons that will inform the current debate over the future and nature of the Guidelines and the proper scope of federal judges' discretion.

22. An analogy would be the rules in soccer and how they affect the decision-making of the players. The rules of play, enforced by the referee, operate to restrict players' decision-making in an obvious way. As the referee takes action by selectively enforcing rules based on the particular facts of the situation, players' behavior is affected. In one game a referee may not call any off-sides penalties, even though the rule is always there. In another game, off-sides might be strictly enforced. In contrast, there are "structural limitations" inherent in a soccer game. All players in a given league will have their decision-making equally affected by such structural limitations as the length and width of the field, or the height and width of the goal. In the United States federal system, Congress creates spot-legislation or cracks down on non-enforcement of previous legislation. This occurs against a series of structural limitations that have existed in our judicial system since its creation in the eighteenth century.

23. England is the particular focus for a number of reasons. First, it is the legal system from whence the American legal system sprang. Second, there would be entirely too much material, over too great a time, if there were not some limits.

I. LIMITATIONS ON JUDICIAL DISCRETION UNDER THE CURRENT U.S. FEDERAL SYSTEM

"Judicial discretion" is a buzz-phrase that defies simple definition. But to borrow an accepted characterization: judicial discretion is either primary or secondary in nature.²⁴ A judge's primary discretion occurs when he or she chooses from amongst a range of choices.²⁵ It is in this area that "the court can do no wrong, legally speaking, for there is no officially right or wrong answer."²⁶ Primary discretion can be limited in two ways. First, Congress can limit primary judicial discretion through specific enactments, which reduce a judge's range of choices through explicit language. As will be discussed below, the Feeney Amendment modifying portions of the Guidelines is such a limitation.²⁷ The Guidelines themselves, although promulgated through a quasi-legislative Commission,²⁸ also embody Congress' desire to target a specific area for the reduction of judicial discretion. Another way primary discretion can be limited is through structural mechanisms, which act in a less obvious way to reduce the range of choices available to a judge. For example, the long-term trend to codify legal doctrines and the role of juries are structural mechanisms that operate to limit primary judicial discretion.

In contrast, secondary discretion deals with the relationship between judges.²⁹ The most notable limitation on this type of discretion is appellate review, and it is therefore almost exclusively a limitation visited on trial court judges.³⁰ This Article addresses both types of discretion primarily as they operate at the federal trial court level.

A. *Structural Limitations on Judicial Discretion in the Current U.S. Federal System*

A variety of structural mechanisms limit the discretion of federal trial court judges: the long-term trend to codify laws, the jury,

24. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

25. *Id.*

26. *Id.*

27. See *infra* notes 59-80 and accompanying text.

28. *United States v. Booker*, 125 S. Ct. 738, 765 (2005) ("[T]he Commission [does] not exercise judicial authority, but [is] more properly thought of as exercising some sort of legislative power . . .").

29. Rosenberg, *supra* note 24, at 637-38.

30. *Id.*

appellate review,³¹ and jurisdiction.

1. Codification

Each year Congress creates scores of new statutes. While sometimes the statutes merely clarify already existing statutes or rules, at times the statutes also take an area of law from the common law and move it into code-based law. Under a common law system, the judge “makes the law” and a particular legal doctrine can change and grow as courts interpret the law in light of the facts of each new case. It is possible under the U.S. federal system consisting of twelve circuit courts of appeals with attendant trial courts (district courts) that until the highest level of appellate review, the U.S. Supreme Court, addresses a particular issue, twelve (or more) different ways of handling a legal issue might co-exist within the federal system. The circuit courts’ respective interpretations of a legal doctrine might develop at disparate rates and in slightly different directions.

Congress sometimes steps in to reduce judicial discretion when a legal doctrine is slow to develop or develops in a way that draws the attention of the other government branches. Thus, the codification of a particular area of law will create uniformity in federal law. One notable example of this is the Federal Tort Claims Act (“FTCA”).³² Tort law is traditionally one of the great common law areas; famous tort cases fill casebooks at most law schools. When the FTCA was enacted, specifically enumerated legal standards curtailed federal judges’ primary discretion by limiting the types and number of choices judges could make when hearing a tort claim. As Congress continues to codify legal doctrines at an ever-increasing rate, it further reduces the substantive areas in which a judge may act with significant discretion.

2. The Jury

Juries are another limit on primary judicial discretion. Historically, juries operate as one of the most significant limitations on judicial discretion by taking fact-finding out of the hands of judges.³³ The jury is a cornerstone of the U.S. legal system. Not

31. Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 56-58 (1995).

32. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified at 28 U.S.C. §§ 1346(b), 2671-2680 (2000)) (authorizing common-law tort claims against the United States).

33. Peterson, *supra* note 31, at 58.

only does the Seventh Amendment guarantee the right to trial by jury,³⁴ but the first Congress also sought to protect the role of common law juries.³⁵ With juries assuming that role of fact-finder, judges are “relegated” to making decisions about the law and legal standards.³⁶ The limitation on discretion is even more pronounced when the presence of a jury is coupled with a cause of action codified by Congress.

There is, however, a caveat to the proposition that juries in the federal system act as a significant discretion-limiting mechanism: juries are less prevalent today than they were in eighteenth and nineteenth century America.³⁷ One must therefore be cautious not to overstate the jury’s role in curtailing primary judicial discretion. Furthermore, as federal judges’ caseloads have increased, it has become more difficult to get a civil case scheduled for a jury trial.

Criminal defendants are guaranteed a “speedy trial,”³⁸ but civil litigants are not. As a result, many parties to civil litigation waive their right to a jury trial in order to expedite their claim. Even with the right to a speedy trial, juries do not decide the outcome in most criminal prosecutions.³⁹ In criminal cases, eighty-six percent of defendants plead guilty and ten percent have their cases dismissed.⁴⁰ Of the remaining four percent, juries decide only some, because defendants can waive their right to a jury trial.

At the time of the framing of the Constitution, the right to a trial by jury operated as a significant check on judicial discretion by taking away from the judge any fact-finding role. In theory, this cut the judiciary’s scope of discretion in half. As the role of the jury

34. U.S. CONST. amend. VII. This amendment provides that

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Id.

35. Peterson, *supra* note 31, at 59 (“The Judiciary Act of 1789 expressly limited equity jurisdiction . . . so as to preserve a common law right to a jury trial.”).

36. I use “relegated” because, in theory, this is still a significant discretionary role.

37. In fact, they are becoming rarer. Gina Holland, *Sharp Decline in Jury Trials Poses Dilemma for Lawyers*, ALBANY DEMOCRAT-HERALD, Aug. 7, 2004, available at <http://democratherald.com/articles/2004/08/08/news/nation/nat.13.txt>.

38. U.S. CONST. amend. VI.

39. Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 14 n.82 (2004) (“[I]n 2003, only 4 percent of defendants in federal criminal cases went to trial . . .”) (citation omitted).

40. LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES, tbl. 3.5 (Mar. 2003), available at <http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf>.

diminishes, it is no longer clear how much primary judicial discretion is limited as a result.

3. Appellate Review

The appellate process operates as a check on judicial discretion by subjecting trial courts to review. In the United States federal judicial system, either party has the right to appeal a trial court's ruling or decision to the federal court of appeals. In turn, a party can request review by the U.S. Supreme Court.⁴¹

Within the check of appellate review there is another mechanism operating to limit (or expand) judicial discretion: the standard of review under which the appellate court examines a judge's ruling at the trial court level.⁴² As the standard of review becomes more deferential ("abuse of discretion" or "clearly erroneous"), judges are said to have more discretion, because they know it is unlikely an appellate court will overturn their rulings. A less deferential standard occurs when a ruling is reviewed *de novo* by an appellate court. Under *de novo* review, a trial court effectively has very little secondary discretion because, on review, the appellate court will step in the place of a trial court and look at an issue anew.

Even though the U.S. Supreme Court hears very few cases, the abstract legal principles it announces operate, along with the doctrine of *stare decisis*,⁴³ as a check on district court and court of appeals judges alike. When the Framers crafted the Constitution, and Congress later added courts,⁴⁴ there was a conscious attempt to limit the amount of discretion or power that might fall in the hands of any single individual. That fear extended to the judiciary. Therefore, appellate review became the ultimate check on individual trial judges' discretion. Justice Jackson best summed up the importance of appellate review: "We [the U.S. Supreme Court] are not final because we are infallible, but we are infallible only be-

41. However, because the U.S. Supreme Court grants petitions for review so infrequently, it is largely the twelve courts of appeals that act as limitations on judges' secondary discretion.

42. "Standard of Review" is the lens through which an appellate court looks at the decision and reasoning of the court below. It is, therefore, a very powerful mechanism for determining the outcome of a case once it has been appealed.

43. *Stare decisis* is defined as: "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

44. U.S. CONST. art. III, § 1 (noting "such inferior Courts as the Congress may from time to time ordain and establish").

cause we are final.”⁴⁵ The design of the federal courts acts as a structural mechanism to limit the amount of secondary, as well as primary, federal judicial discretion.

4. Jurisdiction

The most significant check on federal judicial discretion emerges from the Constitution and cases such as *Erie v. Tompkins*.⁴⁶ While Chief Justice John Marshall may have succeeded in one of the great power grabs in U.S. history in *Marbury v. Madison*,⁴⁷ the Constitution still significantly constrains primary judicial discretion by limiting judicial power to “cases or controversies.”⁴⁸

Additionally, Congress has created a number of specialty courts, such as the Court of Federal Claims, that remove entire areas of law from the hands of a large portion of the federal judiciary. The House of Representatives passage of The Marriage Protection Act provides a perfect example.⁴⁹ This bill would remove questions regarding gay marriage and questions arising from the Defense of Marriage Act from the jurisdiction of the federal courts.⁵⁰ While the constitutionality of this bill is questionable, it nevertheless illustrates that Congress can, and does, attempt to impact judicial discretion by tinkering with the jurisdiction of federal courts.

In turn, each of the above-mentioned changes limits judges’ primary or secondary discretion.

5. Grants of Discretion

The U.S. federal system is unique however, not because of its structural limitations on judicial discretion, but rather because of the mechanisms that operate to ensure it. The framers of the U.S. Constitution wanted an independent federal judiciary (their concerns about consolidation of power notwithstanding).⁵¹ In fact, the federal judiciary is subject to less external checks than any other

45. Peterson, *supra* note 31, at 56 (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953), *overruled by* *Fay v. Noia*, 372 U.S. 391 (1963)).

46. 304 U.S. 64 (1938), *superseded by* 28 U.S.C. § 1961 (2004).

47. 5 U.S. (1 Cranch) 137 (1803).

48. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] . . . to Controversies.”).

49. Marriage Protection Act, H.R. 3313EH, 108th Cong. (2004). It is, of course, extremely unlikely that such a bill would ever pass the Senate.

50. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

51. Peterson, *supra* note 31, at 45.

branch of the government.⁵²

Clauses contained in Article III of the United States Constitution guarantee tenure during good behavior⁵³ and protect federal judges' salaries from being reduced during their time on the bench.⁵⁴ Federal district and appellate court judges are appointed for life terms, thereby acting as another important mechanism in ensuring judicial discretion.⁵⁵ Federal trial court judges also retain significant discretion in pre-trial matters.⁵⁶ The Federal Rules of Evidence and the jury, during trial, significantly limit discretion, whereas prior to trial, judges have significant latitude in handling parties. This is especially true in civil trials, as most pre-trial decisions are not subject to judicial review by federal appellate courts.⁵⁷ Judges also wield powerful discretion in fashioning settlements in the ever-growing field of class action and mass-tort lawsuits.⁵⁸

From this brief and non-exhaustive overview of judicial discretion in the U.S. federal system, several principles emerge. First, U.S. federal trial judges still retain a fair amount of both primary and secondary judicial discretion in a number of areas of law and trial procedure. Second, Congress has acted, and will continue to act, to limit primary judicial discretion where it can, often as knee-jerk reactions to public or political outcry. Finally, significant structural mechanisms operate to limit the exercise of judicial discretion. As will be further discussed below, many of the limitations discussed in this Part are not new, and in fact remain important for many of the same reasons that motivated their development in medieval England.

52. *Id.*

53. U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour.").

54. *Id.* ("[C]ompensation . . . shall not be diminished during their Continuance in Office.").

55. Counter-acting against lifetime appointment is the increased politization of the confirmation process. The Senate will confirm only those judges whom the Executive Branch truly supports. As a result, those judges may feel beholden to an Administration in a way they would not have been when just legal qualifications determined whether someone was confirmed.

56. See generally Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1587-93 (2003).

57. *Id.*

58. *Id.* at 1601-04.

B. *Recent Developments Concerning the Federal Sentencing Guidelines*

1. The Feeney⁵⁹ Amendment and the Guidelines

Congress' passage of the Feeney Amendment reinvigorated the debate over how much discretion federal judges should have, particularly in those areas traditionally the sole province of the judiciary, such as criminal sentencing. The Feeney Amendment, which was tacked on without debate to the "Amber Alert" measure in a last minute move was an overt move by Congress to restrict judicial discretion.⁶⁰

The amendment effectively overruled a 1996 United States Supreme Court case, *Koon v. United States*,⁶¹ by forbidding judges from "departing downward"⁶² from the federal sentencing Guidelines.⁶³ Most ironic about the cries that judicial discretion was out of control, as evidenced by the number of downward departures,

59. The author of the bill was freshman Florida Congressman Tom Feeney. Feeney was recently quoted as saying about himself: "I am here to say that I think Tom Feeney knows more about the Constitution than some of our federal judges." Scott Maxwell, *Hanging with the Chief Justice*, ORLANDO SENTINEL, June 6, 2004, at B2. Feeney is also currently pushing the "Reaffirmation of American Independence Resolution" which would forbid judges from relying on foreign case law when deciding cases. *Id.* Presumably, this would also undermine Justice Scalia's use of English Common Law precedent in both *Blakely* and *Crawford v. Washington*, 124 S. Ct. 1354, 1355-56 (2004) (tracing the historical roots of the right to confront your accuser in his reinvigoration of the Sixth Amendment's Confrontation Clause).

60. Bruce Moyer, *New Sentencing Law Narrows Judicial Discretion*, FED. LAW., May 2003, at 12 [hereinafter *New Sentencing Law*]. The Amber Alert legislation is an anti-child pornography and abduction measure. For an excellent history of the Amendment and the Amber Alert legislation as recounted in the context of a legal case, see *United States v. VanLeer*, 270 F. Supp. 2d 1318, 1322 (D. Utah 2003) (finding that the Amendment allows for discretion in some areas, but that in certain areas judges are completely restrained).

61. *New Sentencing Law*, *supra* note 60, at 12; see also *Koon v. United States*, 518 U.S. 81, 99 (1996) (judge's downward departure was reviewed under an "abuse of discretion" standard and it was appropriate to consider reasons not contemplated by the Guidelines when deciding whether to allow a downward departure).

62. "Departing downward" refers to the practice by federal judges of finding this correct square on the sentencing grid, determining the mandated sentence—say, for example, twenty months—but then disregarding that specifically mandated term and giving something lower—say, nineteen months. The downward departure could be for any number of reasons, including: significant aid to officials in locating other criminals, the defendant's small role in the crime, his or her willingness to plea bargain, or, a feeling by the judge that the person would not be better served from the mandatory time in custody. Of course, judges could depart upwards as well, but this was a far less common occurrence since it raised Eighth Amendment and due process issues.

63. *New Sentencing Law*, *supra* note 60, at 12. While the amendment was originally written to apply to all criminal sentencing, it was subsequently limited to just apply to child pornography and abduction cases. *Id.*

was the fact that federal prosecutors themselves account for more than two-thirds of all requested and granted departures.⁶⁴ The amendment was a direct reaction to a federal district court judge's high-profile comments challenging the efficacy of the Guidelines as they applied to crack cocaine convictions.⁶⁵

The Guidelines have been controversial since their creation as part of the Sentencing Reform Act of 1984 ("SRA").⁶⁶ With the SRA, Congress created a uniform system with the stated goal of consistency in federal criminal sentencing.⁶⁷ The SRA established the U.S. Sentencing Commission ("Commission")⁶⁸ and tasked it with creating a set of guidelines or grid that would circumscribe the length of sentence for those convicted of a federal crime.⁶⁹ The Guidelines allowed for either upward or downward "departure" if the facts of a particular case call for it. Even with discretionary wiggle room for judges, this system was significantly different than the previous sentencing practice, where judges were given vast leeway in determining the length of sentences.⁷⁰

64. Mark Allenbaugh, *Fighting the Feeney Fear Factor: The Federal Courts Strike Back*, CHAMPION, Jan.-Feb. 2004, at 46 (citing UNITED STATES SENTENCING COMMISSION, 108TH CONG., DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 68 (Comm. Print 2003)).

65. Douglas A. Kelley, *Federal Judge Draws Congressional Ire*, BENCH & B. MINN., July 2003, at 22 (discussing the comments by Chief Judge James Rosenbaum when he testified before the House Judiciary Committee in 2002).

66. Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, 3591-3596, and 28 U.S.C. §§ 991-998 (1994)).

67. Kirby D. Behre & A. Jeff Ifrah, *You Be The Judge: The Success of Fifteen Years of Sentencing Under the United States Sentencing Guidelines*, 40 AM. CRIM. L. REV. 5, 5 (2003).

68. The Commission is technically legislative, but it was created within the Judicial Branch. However, the Feeney Amendment's removal of judges from the Commission calls into serious question this distinction. Chanenson, *supra* note 10, at 3.

As the central premise of his forthcoming article, Chanenson suggests that by removing federal judges from the Commission, Congress inadvertently removed the only meaningful distinction between the now-invalid Washington sentencing scheme, and the Guidelines. *Id.* This is an interesting point, and it will be interesting to see what ultimately happens, but I think perhaps it is a distinction without a difference. Whether or not the actual sentences drawn on the grid were conjured up by a panel—authorized by Congress—or Congress itself, the problem remains the same: should judges be allowed to exceed the relevant statutory maximum for a crime without authorization from a jury?

69. See *id.*; Zlotnick, *supra* note 4, at 215-25.

70. See Judge Louis F. Oberdorfer, *Mandatory Sentencing: One Judge's Perspective—2002*, 40 AM. CRIM. L. REV. 11, 12-14 (2003). Specifically:

The statute defining a particular crime prescribed the maximum, but not any minimum, sentence. Before sentencing, the court's probation officer interviewed the defendant and independently investigated his or her personal his-

By themselves, the Federal Sentencing Guidelines, when mandatory pre-*Booker*, operated as a significant limitation on primary judicial discretion by limiting judges to a range of possible sentences, rather than just setting a maximum penalty.⁷¹ The Feeney Amendment further restricted this already limited primary discretion even further by restricting the sentences judges can give in certain types of cases.⁷² As is discussed below, the mandatory provisions of the Guidelines were severed in *Booker* in order to save them from being unconstitutional in light of *Blakely* and *Apprendi v. New Jersey*.⁷³

The Feeney Amendment also attempted to limit a judge's secondary discretion by altering the standard of review for criminal sentences from "abuse of discretion" to "*de novo*."⁷⁴ This provision was severed from the Guidelines in Justice Breyer's portion of the majority opinion in *Booker*.⁷⁵

A provision of the Feeney Amendment that did survive *Booker* allows for tracking of an individual judge's sentencing practices through the issuance of a subpoena.⁷⁶ Congress makes the decision of whom to track on a judge-by-judge basis.⁷⁷ This

tory, education, work experience, prospects, physical and mental condition, and criminal record if there was one. From this information, the probation officer prepared a pre-sentence report. The report also included whatever information the probation officer could gather informally about the sentences actually imposed for similar crimes by other judges on the same court and nationwide. The sentencing itself was a serious and solemn ceremony. In a procedure known as allocution, defense counsel stated his client's case for leniency, including family background, family and community support, education or lack of it, and good works such as military service. The prosecution sometimes, but not always, responded with its perspective on the crime and its significance. Eyeball-to-eyeball with the judge, the defendant stood and spoke. Then the judge, exercising his constitutional judicial power, imposed a sentence.

Id. at 14.

71. The guidelines were originally suggested by a federal judge, but are now an example of unintended consequences. While Judge Frankel, who originally suggested them, saw them as a stop-gap measure that would eventually be replaced by appellate decisions (including the U.S. Supreme Court), the exact opposite has happened. The guidelines have become more entrenched. *Id.* at 15.

72. Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, CHAMPION, June 2003, at 8 [hereinafter *Who's Afraid*].

73. 530 U.S. 466 (2000), cited in *United States v. Booker*, 125 S. Ct. 738, 763-65 (2005).

74. *Who's Afraid*, *supra* note 72, at 11; Bibas, *supra* note 4, at 296.

75. *Booker*, 125 S. Ct. at 763-65.

76. Bibas, *supra* note 4, at 308 n.39.

77. *Id.*

provision's potential for limiting primary discretion has not gone unnoticed, as evidenced by Chief Justice William Rehnquist's comments on the issue: "There can . . . be no doubt that the subject matter of the questions, and whether they target the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."⁷⁸ Tracking by subpoena allows Congress to stand just behind a judge, looking over his or her shoulder and acting as a constant reminder of its presence. This has not gone unnoticed by members of the federal judiciary.⁷⁹

In another structural change, the Feeney Amendment changes the make-up of the Commission so as to no longer require that any of its members be federal judges—a move in stark contrast to traditional makeup of the Commission, as well as the previously unfettered discretion federal judges wielded in criminal sentencing.⁸⁰ A re-constituted Commission without any federal district court judges could likely end up limiting judges' primary and secondary discretion.

2. Sentences for White-Collar Crime

Although the Feeney Amendment garnered the most attention for its discretion limiting nature, it was not the only congressional action in 2003 that restrained the sentencing discretion of the federal judiciary. In November 2003, a new set of amendments to the Guidelines was put in place; these amendments greatly increase the penalties for white-collar crimes such as fraud and theft.⁸¹ These amendments are a damaging attack on judicial discretion. It is not apparent that *Booker* will have any effect on these amendments to the Guidelines.

Normally, the Commission is tasked with making recommendations for changes in the sentencing grid; with respect to white-collar crimes, it did just that.⁸² In the fall of 2002, the Commission completed a six-year study and concluded that changes needed to

78. *Judges Challenge Congress*, *supra* note 5, at 10.

79. *United States v. Kim*, 313 F. Supp. 2d 295 (S.D.N.Y. 2004); *see also* Mark H. Allenbaugh, *Heatwole: A Test Case for Sentencing Sanity*, 18 CRIM. JUST. 28, 29 (2004); *but see* Gerber, *supra* note 5, at 74-75.

80. *See generally* *United States v. Detwiler*, 338 F. Supp. 2d 1166 (D. Ore. 2004) (finding that the Feeney Amendment's changes to the Commission violated the Separation of Powers Doctrine).

81. *Grid & Bear It*, *supra* note 7, at 44.

82. *Id.*

be made to the grid by enhancing penalties for certain white-collar crimes.⁸³ However, just seven months after the study and recommendations, Congress, reacting to the Enron and WorldCom scandals, suggested, without ever studying the issue, that even harsher penalties than the Commission's six-year study suggested were necessary.⁸⁴ This has led to outlandish results already.⁸⁵

While the Commission could have ignored the recommendations, it bent under significant political pressure and adopted them.⁸⁶ As one commentator noted, "[a]s an independent agency of the Judiciary Branch . . . the Commission must do more than reflexively adopt the recommendations of the Executive and Legislative Branches."⁸⁷ If Congress continues to flex its muscle in this knee-jerk manner, structural mechanisms that protect judicial discretion will be eroded.

The recent changes to the Guidelines highlight Congress' desire to reign in the federal judiciary by reducing the federal judges' primary discretion, and to a lesser extent, secondary discretion. Congressional action in response to the crisis *de jure* requires attention, but it is important to note that identifying inherent structural limitations is just as critical for understanding the scope of judicial discretion. Even though structural limitations do not draw as much attention, they often operate to do more to limit judicial discretion than congressional reactions.⁸⁸

Congress' desire to limit judicial discretion is not new. The roots of these structural limitations and the strong desire to take specific action to limit judicial discretion can be traced to medieval England. Therefore, to truly understand the impact of Congress' current actions and reactions, we must travel back in time to the birth of the Common Law.

83. *Id.*

84. *Id.* at 44-45; Thomas Lee Hazon, *Securities Law for Non-Securities Lawyers: Overview of Federal Securities Law*, ALI-ABA COURSE OF STUDY, at 6 (2004) ("The Sarbanes-Oxley Act of 2002 was the Congressional reaction (overreaction?) to scandals such as Enron and Worldcom.").

85. John Gibeaut, *Do the Crime, Serve More Time*, 3 A.B.A. J. E-REPORT 13 (2004) (discussing the twenty-four year and four month sentence for a young mid-level accountant at Dynegy, Inc. who was described as "essentially nobody" in a stock fraud scandal).

86. *Grid & Bear It*, *supra* note 7, at 45.

87. *Id.*

88. Of course, a prolonged period of constant enactments by Congress would have a cumulative effect akin to a structural mechanism, but that discussion is beyond the limited scope of this Article.

3. *Blakely v. Washington*

The “effect” of today’s decision will be greater judicial discretion and less uniformity in sentencing.⁸⁹—Justice O’Connor

Justice O’Connor simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction.⁹⁰—Justice Scalia

Regardless of which Justice is ultimately proven correct, the immediate “effect” is clear: sentencing discretion is a hot topic. In fact, the decision has spawned web logs (“blogs”) and whole webpages devoted to *Blakely* and sentencing resources.⁹¹

While *Blakely* was confined to examination of Washington State’s determinate sentencing scheme, the implications of *Blakely* were immediately apparent: what effect would *Blakely* have on whether the Guidelines were valid?⁹² The U.S. Supreme Court quickly granted *certiorari* in two of the early cases that invalidated either part, or all, of the Guidelines as they pertain to factors that increase sentences without authorization from a jury.⁹³

Ralph Blakely pled guilty to kidnapping.⁹⁴ The statutory maximum for the crime was fifty-three months.⁹⁵ However, the judge felt Blakely had displayed “deliberate cruelty” and imposed a

89. *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2004) (O’Connor, J., dissenting). According to Justice O’Connor:

Sentencing judges . . . had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories.

Id. at 2544 (O’Connor, J., dissenting).

90. *Id.* at 2541.

91. The single best resource for *Blakely* information has to be the blog *Sentencing Law and Policy*, operated by Ohio State University law professor Douglas A. Berman, available at <http://sentencing.typepad.com>; see also First District Appellate Project, *Blakely v. Washington Resources*, available at <http://www.fdap.org/blakely.html>.

92. Dale Emch, *Federal Sentence Guidelines Are Up in Air after Decisions*, TOLEDO BLADE, July 18, 2004; Dan Laidman, *O’Connor Criticizes Court Decision*, MONTGOMERY HERALD, July 23, 2004 (O’Connor called the *Blakely* decision a “number 10 earthquake”); David Savage, *Thousands of Cases in Doubt After Decision on Sentencing*, L.A. TIMES, June 26, 2004; Eric Weslander, *Congress May Look to Kansas for Sentencing Guidance*, LAWRENCE JOURNAL-WORLD, July 18, 2004.

93. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3074 (U.S. July 21, 2004) (No. 04-104); *United States v. Fanfan*, 2004 U.S. Dist. Lexis 18593 (D. Me. 2004), *petition for cert. filed*, 73 U.S.L.W. 3074 (U.S. July 21, 2004) (No. 04-105).

94. *Blakely*, 124 S. Ct. at 2533.

95. *Id.* at 2535.

ninety-month sentence.⁹⁶ Even though the judge was allowed to do this under Washington law, the Court invalidated the procedure.

The Court in *Blakely* said that Washington's determinate sentencing schemes were the "statutory maximums" that a judge could not exceed without a jury's authorization.⁹⁷ It does not matter that it was the legislature that granted the judge the right to ratchet-up the penalty; a jury must establish all factors that determine the sentence for a criminal defendant.⁹⁸

4. *United States v. Booker*

In *Booker*, the Court picked up where it left off in *Blakely*. The majority opinion in *Booker* is divided into two parts. The first portion, which upholds *Apprendi*⁹⁹ and applies *Blakely's* interpretation of the Sixth Amendment to the Guidelines, is authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsberg.¹⁰⁰ The second portion of the majority opinion is authored by Justice Breyer and is joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsberg. This portion "saves" the Guidelines from being unconstitutional by severing the mandatory portions of the Guidelines and the Feeney Amendment.¹⁰¹ Justices Scalia, Souter, and Thomas all issued solo opinions dissenting in part, while Justice Stevens also authored a partial dissent that Justices Scalia and Souter joined.¹⁰²

The first portion of the *Booker* opinion was not surprising in light of *Apprendi* and *Blakely*. As Justice Stevens noted:

Accordingly, we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.¹⁰³

Because the Guidelines required federal judges to move around (and up) on the sentencing grid based on facts not proved to a jury, the Guidelines were unconstitutional. If Justice Steven's portion of

96. *Id.*

97. Chanenson, *supra* note 10, at 3-4.

98. *Id.* at 2.

99. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

100. *United States v. Booker*, 125 S. Ct. 738, 745 (2005).

101. *Id.* at 756.

102. *See generally id.* at 738.

103. *Id.* at 756.

the majority opinion were the end of the analysis, the Guidelines would fall.

However, the second portion of the majority opinion severs the mandatory provisions of the Guidelines in order to save the whole sentencing scheme from being declared unconstitutional.¹⁰⁴ This is the portion of the opinion that renders the previously mandatory Guidelines advisory.¹⁰⁵ It is this second portion of the opinion that will no doubt garner the most attention from commentators and, more importantly, Congress.

Justice Breyer's portion of the majority opinion in *Booker* examines two primary options for "saving" the Guidelines from being declared unconstitutional. One option, which Justices Stevens, Souter, and Scalia advocate in a partial dissent, would engraft a Sixth Amendment jury trial requirement onto the Guidelines.¹⁰⁶ Justice Breyer's majority rejects this: "The addition would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit)."¹⁰⁷

Instead, the Court adopted the second option which, through severance of the offending provisions, "make[s] the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."¹⁰⁸

The majority justified the severance of the mandatory provisions of the Guidelines by noting that

We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system But, we repeat, given today's constitutional holding, that is not a choice that remains open. Hence, we have examined the statute in depth to determine Congress' likely intent *in light of today's holding*.¹⁰⁹

Justice Scalia responded: "The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, [the

104. *Id.*

105. *See* United States v. Wilson, 350 F. Supp. 2d 910, 911 (D. Utah 2005).

106. *Booker*, 125 S. Ct. at 756.

107. *Id.*

108. *Id.*

109. *Id.* at 767-68.

majority] discards the provisions that eliminate discretionary sentencing.”¹¹⁰ Justice Scalia’s point is well-taken, because by choosing to render the Guidelines advisory, the majority may have taken a path that is sure to bring congressional reaction. Had the majority chosen to engraft the Sixth Amendment jury trial protections onto the Guidelines, the ability of Congress to react may have been significantly reduced.

A federal jury in Wisconsin convicted Freddie Booker of possessing 92.5 grams of crack cocaine.¹¹¹ This offense carried a prison term of ten years to life.¹¹² Under the Guidelines, Booker’s criminal history and the jury’s finding required the district court judge to select a “base” sentence between 210 months and 262 months.¹¹³ However, in post-trial sentencing the district court judge found by a preponderance of the evidence that Booker possessed an additional 566 grams of crack cocaine and also obstructed justice.¹¹⁴ These findings moved Booker’s sentencing range under the Guidelines upward to 360 months to life.¹¹⁵ As the Court noted, this increased Booker’s maximum exposure under the Guidelines beyond twenty-one years, ten months to the thirty-year sentence that the district court judge ultimately imposed.¹¹⁶ In light of the Court’s first portion of the majority opinion applying *Apprendi* and the Sixth Amendment analysis of *Blakely* to the Guidelines, the Court affirmed the Seventh Circuit’s decision in *Booker*.¹¹⁷

Federal criminal defendants and their attorneys should understandably be pleased with *Booker* if they thought the Guidelines’ sentences were too harsh and if they thought that judges might show them some mercy with their new-found sentencing discretion.

110. *Id.* at 790 (Scalia, J., dissenting).

111. *Id.* at 745. *Booker* is a consolidated appeal with *United States v. Fanfan*. Duncan Fanfan was similarly convicted of drug offenses. However, the district court in *Fanfan* opted not to follow those portions of the Guidelines that implicated Sixth Amendment concerns, instead sentencing the defendant “based solely upon the guilty verdict” and not the sentence-enhancement factors. *Id.* at 747. In *Booker*, the U.S. Court of Appeals for the Seventh Circuit invalidated the portion of the sentence that was contrary to the Court’s holding in *Apprendi*. *Id.* at 745. In *Fanfan*, the case bypassed the U.S. Court of Appeals for the First Circuit when the Court granted the government’s writ of *certiorari*. *Id.* at 747.

112. *Id.* at 745.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 769. However, the Court vacated the sentence in *Fanfan* and remanded for potential re-sentencing in light of the *Booker* opinion. *Id.*

Any rejoicing, however, may be premature. For example, at least one district court has considered the advisory nature of the Guidelines and imposed a sentence with its newfound discretion that was within the range the Guidelines mandated.¹¹⁸

The other reason celebration may be premature is that *Booker* is sure to provoke a response from Congress. After all, in restoring some sense of judicial discretion to federal sentencing, Justice Breyer's portion of the majority opinion has effectively neutered the Guidelines. All that is yet to be determined is the measure of Congress' response. But irrespective of the form of the inevitable reaction, for the purpose of this Article, the point is simple: before Congress¹¹⁹ rushes to react to a functional invalidation of the federal determinate sentencing scheme, or before Congress acts to shore up the still-valid portions of the Guidelines, it is important to think about the relevant historical roots of judicial discretion. It is likewise equally important to look back and examine the impact of measures designed to limit judicial discretion. Only through revisiting the past will Congress be able to craft a constitutional set of Guidelines that properly balance its desires with the valuable sentencing experience many federal judges bring to the process.

II. JUDICIAL DISCRETION IN MEDIEVAL ENGLAND

Given England's connection to the U.S., it is logical to limit the scope of this inquiry to medieval England. However, picking a specific period is the more difficult task. The simplest comparison would be to pick the time period after which the English common law legal system was firmly established, between the sixteenth to eighteenth centuries. However, I have chosen the period between the invasion by Norman Duke William in 1066 and the offering of the Magna Carta in 1215 as the most informative for understanding the implications of Congress' current actions.

The years immediately following the Norman Conquest were a tumultuous period that turned out to be the inception of what we recognize as the modern Anglo-American legal tradition. There were struggles between competing traditions and customs (Norman vs. English; secular vs. ecclesiastical; centralized vs. local), the

118. *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (imposing a 188 month sentence in light of *Booker* when the Guidelines would have imposed a sentence of no less than 188 months).

119. None of the principles in this Article apply exclusively to federal judicial discretion. In fact, a state like Washington, faced with a now-invalid determinate sentencing scheme, would do well to heed the historical foundation of judicial discretion.

emergence of a professional judicial core, and there was an explosion in the volume of litigation.¹²⁰ The inherent tensions in these evolutionary conflicts help to illustrate under what circumstances, through what mechanisms, and why sovereigns have sought to limit or expand judicial discretion.

To understand an English judge's role during this period, and thereby truly grasp the level of primary or secondary discretion¹²¹ he¹²² may or may not have had, it is probably best to sketch briefly the development of the English legal system post-Norman Conquest to 1215.¹²³

A. *Overview of the Development of the Medieval English Legal System: 1066–1215*

1. English Law

Regardless of where one starts one's examination of the English legal system, it is impossible not to mention the influence of the Norman Conquest. It has been said that the "[c]onquest is a catastrophe which determines the whole future history of English law."¹²⁴ The Normans "brought a taste for strong government and a flair for administration,"¹²⁵ and it was this flair that eventually enabled judges (or others) to rule on behalf of the king without him being physically present.¹²⁶ The Normans (King William specifically), brought an aptitude for administration, but chose to leave English law largely in place, with some structural revisions, rather than impose what remained of Norman laws.¹²⁷ With important ad-

120. See *infra* Part II.A.

121. I will continue to use the same general definitions of primary and secondary discretion discussed above, although discretionary limits are more explicitly discussed later in the text. See *infra* Part II.B.

122. If I use a personal pronoun when referring to judges in Part II, I will use "he" because judges in medieval Europe were male.

123. There are whole books written on English history and English law during this period. I will limit my discussion to this period's relevant highlights for understanding the development or changes in judicial discretion.

124. 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 79 (Cambridge Univ. Press 1968) (1895).

125. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 6 (Butterworths Lexis Nexis 2002) (1971). But see R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 28 (Cambridge Univ. Press 1988) (1973) (noting that the transition was not solely genius, but a large degree of luck as well).

126. BAKER, *supra* note 125, at 12.

127. POLLOCK & MAITLAND, *supra* note 124, at 79 (the decision not to impose Norman law on the English may ultimately have saved English law from being swallowed by the Roman legal renaissance that was just around the corner). See also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 60 (1981).

ministrative contributions came increased judicial efficiency.¹²⁸ The royal courts became a court of justice for all, so it became necessary to alter the structure of the courts by simultaneously centralizing and specializing them.¹²⁹

It is not entirely obvious what exactly constituted the “law of England” in the years immediately following the Conquest. For one thing, the laws and administration of justice in England endured several encounters with competing legal systems during the late eleventh and early twelfth centuries.¹³⁰

Further, the Normans did not bring a code with them, for there was no written Norman code.¹³¹ Even an early book credited as being the laws of King William granted to the English is merely a hodgepodge of different legal systems. The *Leis Williame* is part Norman-interpretive understanding of old English law, part translation of parts of Cnut’s code, all with a sprinkling of “articles which betray the influence of Roman law.”¹³² In the end, a person might draw on the old English dooms, the *Lex Salica* (canonical law), or the re-emerging Roman law.¹³³ Add to this French-speaking nobility trying to rule an English population used to Wessex law, Mercian Law, or Danelaw, and it made for quite a confusing state of affairs. From a legal-consistency perspective, “the country was becoming covered with small courts” with one rising over another further fractionalizing legal customs.¹³⁴ It was a constant challenge to figure out which court had jurisdiction over what causes of actions.

2. The King’s Central Courts

From the chaos emerged the future of English law as we now know it, and as Sir Frederick Pollock and Frederic William

128. POLLOCK & MAITLAND, *supra* note 124, at 153.

129. *Id.* at 153. See also VAN CAENEGEM, *supra* note 125, at 19.

130. POLLOCK & MAITLAND, *supra* note 124, at 80-87. One of the conflicts was for linguistic supremacy, with French emerging as the main victor. French is the “main victor” for a couple of reasons. First, there were very few Frenchmen actually in England after the Norman Conquest, so the fact that it gained a foothold within the law is no small feat. Second, law to this day is stamped with French words, such as tort and others. As Pollock and Maitland point out, the English that French eventually yielded to was “an English in which every cardinal word was of French origin.” *Id.* at 85. The linguistic battle was important because “language is no mere instrument which we can control at will; it controls us.” *Id.* at 87.

131. *Id.* at 79.

132. *Id.* at 102. It is also likely the volume was not published until well after William’s death.

133. *Id.* at 105.

134. *Id.* at 106.

Maitland note, it was the king's court.¹³⁵ At the time, the king's court was a flexible, equity court that met hardly three times a year, yet was centralized, with "the king's justice . . . done under his own eye."¹³⁶ In that respect, it is important to remember that the "judges were not set so clearly apart from the executive as in modern times."¹³⁷

The central court of the king's justice (*capitalis curia Regis*) was comprised of sworn, permanent justices who served the king and were experts in the administration of justice.¹³⁸ When the king was absent, certain cases or complaints would be heard by another group of judges of the royal court who sat at Westminster.¹³⁹ During the Westminster sessions, the king would often be absent, and so these sessions also became quite popular. In fact, when the barons "extorted"¹⁴⁰ the Magna Carta from King John, one of the provisions they demanded provided for a permanent court of common pleas at Westminster, so cases could be heard out of earshot of the king.¹⁴¹ With this development the "personal justice of the king [became] the institutional justice of the king's court."¹⁴²

The king had significant control over judges in his courts. In 1203, the king directed judges to act merely as "arbitrators" and to "make peace between the parties."¹⁴³ On other occasions the court might feel a matter was beyond its competence.¹⁴⁴ Since the king was seen as the wellspring of law, difficult points were sometimes referred to the judgment of the king.¹⁴⁵ This combination of judicial deference and kingly decrees limited judges' primary discretion.

Although substantial, the king's control over the justices was not absolute. During the king's absence, the justices would often dispense judgments in his name. Normally, the king might demand that he be present for the hearing of certain cases. For example, in 1201, the king found a matter so important as to demand that its

135. *Id.* at 107. The two courts closely associated with the central king's courts were the "King's Court" and the "Common Court."

136. *Id.* at 107-09.

137. SIR CYRIL FLOWER, INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230 A.D. 15 (Selden Society 1944).

138. POLLOCK & MAITLAND, *supra* note 124, at 154-55.

139. SHAPIRO, *supra* note 127, at 74.

140. *Id.*

141. *Id.*

142. *Id.* at 75.

143. FLOWER, *supra* note 137, at 15.

144. *Id.*

145. *Id.*

resolution be postponed until his return to England.¹⁴⁶ Despite such instructions, the king's demands were not always obeyed. On several occasions in 1205 and 1206, the *Curia Regis Rolls* reveal that the king's court proceeded on its own, despite *assizes* mandating that a case should be delayed or postponed.¹⁴⁷ Even so, the instances where the king's judges exhibited independence from decrees were few in comparison to acts of obedience.¹⁴⁸

3. Other Royal Courts

An elaborate system of royal courts developed in the two hundred years following the Conquest. These courts operated "beneath" the central King's Court, but were, nevertheless, vital for the administration of justice in England and ultimately responsible to the king. In addition to the King's Court and Common Court, there were four other "central" courts: The Exchequer (dealt primarily with money issues); Courts of the Forest (dealt with the king's forests); Courts of the Jews (dealt with money-lending issues); and the Courts of the Palace (handled cases arising on the grounds of the king's palace at Westminster).¹⁴⁹ Each of these courts had specialized jurisdiction over a geographical area or subject matter. These specialized courts allowed the king to solidify his grasp on an area of law, while not necessarily running it through the two main royal courts.

For the widespread administration of the king's justice, however, one court played a very important role. The Court of the Justices in Eyre was the roaming court that served as the link between central and local jurisdictions.¹⁵⁰ Henry I was the first to take full advantage of these justices by seating a more permanent tribunal made up of trusted barons and clerks who were occasionally sent out into "the counties to hear the pleas of the crown."¹⁵¹ "Instead of long-term delegation of royal authority to a lord permanently connected to a single territory, there would be a temporary delegation to a king's officer," who occasionally traveled out on his "eyre," where upon returning his authority was surrendered back to

146. *Id.* at 33. Often the "matter of importance" involved either important tracts of land or individuals closely associated with the king.

147. *Id.* at 34.

148. *Id.* at 35.

149. *Id.* at 43-53.

150. *Id.* at 53.

151. POLLOCK & MAITLAND, *supra* note 124, at 109.

the king.¹⁵² The use of the eyre was at once an "administrative solution to an administrative problem,"¹⁵³ while at the same time it limited the power and discretion of local judges.¹⁵⁴

The rise of the courts of eyre was, in part, a response to the problem that the local courts continued to splinter because "[a]s the barons became more powerful, they tended to garner the position of sheriff in their locale for themselves or their friends."¹⁵⁵ The sheriffs then ceased transmitting royal power into the countryside.¹⁵⁶ Justice in the County Court may have been quicker than other royal courts, but hardly anyone would contend that it was impartial.¹⁵⁷ The problem of impartiality became less of an issue as royal control was centralized. In fact, some enquiries were delegated from the central courts at Westminster to the local sheriffs.¹⁵⁸

Local courts and customs were not the king's only competition. Ecclesiastical courts with their canonical law, as well as the re-emerging Roman law, played important roles in the early administration of justice.¹⁵⁹ Canonical law eventually became the competing legal system to English secular law, while Roman law acted more as an influencing agent. Canonical law claimed jurisdiction over certain ecclesiastical issues (and some marginally so) with the rest largely left to the secular law of laymen.¹⁶⁰

Eventually, English secular law won out. At first, English courts took bits and pieces from canon law, but in the end the "king's justices . . . [became] interested in the maintenance of a system that is all their own."¹⁶¹ The justices' system would be dictated from within, not from abroad.¹⁶² The church too was trying to limit the jurisdiction of its clerics/judges by later forbidding them to sit over secular matters or render judgments in secular cases.¹⁶³ The king and the church were simultaneously struggling to bring their respective judges under their exclusive control.

Finally, there remained private courts and other local courts,

152. SHAPIRO, *supra* note 127, at 72.

153. *Id.* at 73.

154. VAN CAENEGEM, *supra* note 125, at 13.

155. SHAPIRO, *supra* note 127, at 71.

156. *Id.*

157. FLOWER, *supra* note 137, at 61.

158. *Id.* at 70.

159. POLLOCK & MAITLAND, *supra* note 124, at 111.

160. *Id.* at 124-30.

161. *Id.* at 135.

162. *See id.* at 135.

163. ALAN HARDING, *THE LAW COURTS OF MEDIEVAL ENGLAND* 47-48 (1973).

although both slowly lost importance as time passed from the Conquest. Private courts would handle claims made between two individuals that had the same lord.¹⁶⁴ The Hundred Court and other local courts would handle local matters, but if significant land was at stake, often at least one of the participants would seek the impartiality of the royal courts.¹⁶⁵

4. The Development of the Law

Even though the Normans did not bring with them an established legal code and adopted a mix-match of legal traditions in England, a more centralized form of law was needed for effective rule. This was accomplished through specific decrees by the king, as well as the continued centralization of the courts.

Under Henry II, the first large steps were taken towards establishing early notions of a uniform common law.¹⁶⁶ In the late twelfth century, Henry held a council at Clarendon where he forced his nobles to clarify the law of the land where there was conflict between canon and secular law.¹⁶⁷ Henry also tightened the administration of justice by speaking with his justices about procedures or the state of laws.¹⁶⁸

These changes, along with the *Assize of Clarendon*,¹⁶⁹ (which significantly changed the administration of criminal law), an investigation into the practices of sheriffs in 1170, and the *Assize of Northampton* in 1176 (a new set of instructions to his justices), all combined to strengthen the central control of justice, and its justices, by the crown.¹⁷⁰ As was well put by Pollock and Maitland:

If we try to sum up in a few words those results of Henry's reign which are to be the most durable and the most fruitful, we may say that the whole of English law is centralized and unified by the institution of a permanent court of professional judges, by the

164. FLOWER, *supra* note 137, at 92.

165. *Id.* at 83.

166. POLLOCK & MAITLAND, *supra* note 124, at 136-37. One important point about "common law" is that it was not at this point just judge-made law (as we commonly use the term today), but rather was a way to distinguish secular law from canonical law, or royal law from local. It was a term used to differentiate between types/categories of law. Eventually, judge-made vs. statutory became another one of the distinctions, and the one that holds true to this day. See *supra* Part I.B. See also VAN CAENEGEM, *supra* note 125, at 3.

167. POLLOCK & MAITLAND, *supra* note 124, at 137.

168. *Id.* at 136.

169. *Id.* at 137.

170. See *id.* at 137-38. See also VAN CAENEGEM, *supra* note 125, at 18.

frequent mission of itinerant justices throughout the land, by the introduction of the 'inquest' or 'recognition' and the 'original writ' as normal parts of the machinery of justice.¹⁷¹

As previously discussed, it is significant that each and every one of these "normal parts" operates as a limitation on judicial discretion. The limitations serve other important functions besides restraining the judiciary.¹⁷²

Henry II's reforms widened the reach of monarchical power and stripped many private parties of their traditional remedies, both in civil and criminal matters.¹⁷³ The king's judges and officers also took more control over the prosecution of serious crime¹⁷⁴ as the list of criminal matters under the king's control grew.¹⁷⁵

During this period the first of the great English law books was published: *A Treatise on the Laws and Customs of England composed in the time of King Henry the Second while the honourable . . . Ranulf Glanvill held the helm of justice*.¹⁷⁶ Although it is not clear if Glanvill actually wrote the book, it nevertheless became quite popular.¹⁷⁷ Glanvill's book acted as a reference for judges, although not in the precedential sense.¹⁷⁸ Precedent and case law would emerge relatively soon though.¹⁷⁹

At Henry's passing,

the strong central court was doing justice term after term on a large scale [and would continue to do so through the reign of King Richard]; it was beginning to have a written memory which would endure for all ages in the form of a magnificent series of judicial records.¹⁸⁰

171. POLLOCK & MAITLAND, *supra* note 124, at 38.

172. *See supra* notes 135-66 and accompanying text.

173. THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 9 (1985).

174. Sir Frederick Pollock, *The King's Peace in the Middle Ages*, 13 HARV. L. REV. 177, 178 (1900).

175. *Id.* at 177-78. This does not mean that the local role ceased. In one example from the *Curia Regis* rolls of the Justice in Eyre, the sheriff seems to have been the one to determine the outcome of a criminal accused of the rape and robbery of a woman. FLOWER, *supra* note 137, at 57.

176. POLLOCK & MAITLAND, *supra* note 124, at 163-64.

177. *Id.* at 163, 166.

178. *Id.* at 166.

179. The book that would act more as a reporter of cases for precedential use was Bracton's great law book, compiled between 1250-1258. Unlike Glanvill before him, Bracton drew on precedent and provided an accurate and uniform view of English law. *Id.* at 206-07.

180. *Id.* at 168-69.

The English legal system continued to evolve at a quickening pace from the thirteenth century on (and beyond the scope of this Article). The largest development that bears mentioning for the purpose of this Article is the Magna Carta.¹⁸¹ It was demanded by the barons, granted by the King, and served as the most significant check on the king's justice to that point.¹⁸² The king too closely controlled the royal courts¹⁸³ and judicial discretion was limited to such an extent that the barons demanded changes.¹⁸⁴ One significant outcome of the Magna Carta was to place the king "*below* the law."¹⁸⁵ The Magna Carta was the first great statute of England and it wrestled away some of the king's control over judges and the law. From that point on, judicial discretion would continue to expand in England and later, some of the Magna Carta's central discretionary principals would be embodied in the U.S. Constitution.¹⁸⁶

B. *Judicial Discretion in Medieval England between 1066 and 1215*

Closely associated with the Anglo-Saxon legal tradition is the concept of judicial independence. Today, we might conceptualize this as freedom from constraint, or the opportunity to exercise discretion. Yet, early medieval English judges were not independent in the way we now think of "independence."¹⁸⁷ Between 1066 and 1215, justices were never truly "independent."¹⁸⁸ The king was above everyone else (at least until the Magna Carta), and the

181. A copy of the Magna Carta translation is available through the U.S. National Archives and Record Administration at http://www.archives.gov/exhibit_hall/featured_documents/magna_carta/translation.html.

182. POLLOCK & MAITLAND, *supra* note 124, at 181.

183. *Id.* at 204 (judges on the King's Bench are "very truly the king's servants"); see also HARDING, *supra* note 163, at 38 ("scope of royal justice depended . . . on the king's power").

184. Daniel Brook, *Happy 789th, Magna Carta*, LEGAL AFF., Nov.-Dec. 2004, at 10.

185. POLLOCK & MAITLAND, *supra* note 124, at 181-82.

186. Brook, *supra* note 184, at 10.

187. SHAPIRO, *supra* note 127, at 66. At first blush this will limit the conclusions that might be drawn from a comparison between the current federal judicial system and medieval England's. However, as will be discussed below, this does not operate as a significant barrier.

188. See *id.* at 66-67. But see *United States v. Ranum*, No. 04-CR-31, 2005 U.S. Dist. LEXIS 1338 (E.D. Wis. Jan. 19, 2005) (imposing a twelve month, one day sentence where the Guidelines would have required a sentence range of thirty-seven to forty-six months).

judges were clearly his subjects.¹⁸⁹

Martin Shapiro suggests that "most of the phenomena we come to call judicial independence, or see as the roots of judicial independence, are closely associated historically with a long-term English tendency toward extreme political centralization."¹⁹⁰ The courts' "powers and jurisdiction, indeed their very existence, have been determined by the king's commission and/or parliamentary statute."¹⁹¹ Even so, just prior to the Norman Conquest, English judges did occasionally exercise discretion when it came to imposing penalties.¹⁹² After the Conquest, however, the Norman kings would understandably be involved in the administration of justice as a tool for ruling a foreign land.¹⁹³

There were four main structural mechanisms that acted to limit judicial discretion in medieval England between 1066 and 1215: (1) the centralization of the courts and the accompanying uniformity in the law; (2) the advent of the jury; (3) "appellate" review; and (4) jurisdictional limitations, including the specialization of courts.¹⁹⁴ As with the discussion of the U.S. legal system, this list is not exhaustive, but covers the primary structural limitations on judicial discretion. Additionally, there were spot-measures and specific decrees by the king that acted to limit discretion, such as the *Assize* discussed above.¹⁹⁵

1. Centralization of Courts and Uniformity in the Law

As the Norman kings consolidated the numerous English courts into a smaller number of royal courts,¹⁹⁶ two things further acted to limit judicial discretion. First, centralizing courts allowed for the transmission of the king's power through "tentacles running into the countryside."¹⁹⁷ This allowed for more control by the king over the actual decisions. This was especially so for kings like King John, who was absent from England far less frequently than some

189. *Id.* See also VAN CAENEGEM, *supra* note 125, at 23 (describing the background and training of Henry II's justices).

190. SHAPIRO, *supra* note 127, at 66.

191. *Id.*

192. NAOMI D. HURNARD, *THE KING'S PARDON FOR HOMICIDE: BEFORE A.D. 1307*, at 2 (1969).

193. See RALPH V. TURNER, *THE KING AND HIS COURTS: THE ROLE OF JOHN AND HENRY III IN THE ADMINISTRATION OF JUSTICE, 1199-1240*, at 11 (1968).

194. See *supra* notes 135-66 and accompanying text.

195. See *supra* notes 169-72 and accompanying text.

196. See discussion *infra* Parts II.A.2, II.A.3.

197. SHAPIRO, *supra* note 127, at 78.

of the early Norman kings.¹⁹⁸ The king's actual physical presence allowed for far more control over the outcome of individual cases. The king also maintained "his freedom to draw those cases that interested him or involved him in some indirect way into his own court, where he could watch over them more closely."¹⁹⁹

Second, as litigants discovered that the king's justice was not only more efficient, but also supposedly less biased, many litigants began to pursue their cases in royal courts. This had the effect of limiting the number of cases under local control. Thus, the centralization allowed the king more control over his own judges' decisions while simultaneously structurally limiting the primary discretion of local judges by removing more and more types of claims or actions from their courts and into the hands of the king.

The king's "tentacles" were the itinerant justices, who along with the central royal court sitting at Westminster, played an important role in the centralization of power.²⁰⁰ Itinerant justices traveled out into the countryside on temporary assignments to hear cases in the king's name.²⁰¹ While centralizing power in the king, the act of bringing the itinerant justices back into the king's presence functioned to limit those justices' ability to exert any kind of independence or discretion—provided they wanted to remain on the king's good side. Henry II can be credited for refining the role of the itinerant justices by sending them out on regularly scheduled circuits, so locals would be able to count on when the king's law would come to town.²⁰² Regularity allowed for further reliance by litigants.

Another by-product of sending the itinerant justices was the diffusion of a more uniform body of English law.²⁰³ Rather than having a different legal custom in each village that only a well-versed local judge might be able to decipher, slowly there emerged increased consistency and overall uniformity.²⁰⁴ However, the itinerant justices did not have unfettered discretion to impose the king's laws as they saw fit. In 1178, the King returned to England and heard complaints about itinerant justices enforcing the *Assize*

198. TURNER, *supra* note 193, at 21.

199. *Id.* at 35.

200. *Id.* at 10-11.

201. HARDING, *supra* note 163, at 32-38; TURNER, *supra* note 193, at 10-11.

202. TURNER, *supra* note 193, at 11-14.

203. HARDING, *supra* note 163, at 38.

204. *See id.*

of *Northampton* with too much "zeal."²⁰⁵ The justices in question were removed and although itinerant justices were sent out again the following year, the message was clear: you [itinerant justice] are allowed some freedom, but never forget you are the king's servant.²⁰⁶

The king's displeasure at over-enforcement of his decrees should be contrasted with the discretion that remained inherent in the system when it came to lessening sentences. For many crimes, justices retained the discretion to lessen the penalties or "impose a pecuniary penalty in lieu of more severe punishment."²⁰⁷ Justices' exercise of discretion, when it came to lessening penalties, was designed to have a specific effect. By allowing judges to lessen some penalties based on the facts of the case, the aim "was the maintenance of good law and good order, and in relying on discretionary powers to avoid undue rigidity in his new rules, Henry II was following the traditional policy of Saxon and Danish kings."²⁰⁸ This increased the likelihood that the Norman kings' decrees and laws would be followed and respected.

Some very serious crimes, such as felonious homicide, would be removed to the sole province of the king, but in many cases the "king's justices, whether in the *Curia Regis* or on eyre, had authority to license concords in appeals of breach of [the king's] peace."²⁰⁹ Licenses for concords were like pardons, except that they were issued when it looked likely that a party would prosecute an "appeal" to the case.²¹⁰

Homicide, the ultimate breach of the king's peace, understandably became a subject matter the king took great interest in. Early after the Norman Conquest, some killings were considered local in nature and would not have been under the king's justice,²¹¹ but that distinction did not last long. In the *Assize of Clarendon* in 1166, for example, no distinction was made between killings that did not invoke the king's peace and those that did.²¹² Later, this would result in quite odd resolutions.

For example, in 1203 a man killed five people in a "fit of mad-

205. VAN CAENEGEM, *supra* note 125, at 21.

206. *Id.*

207. HURNARD, *supra* note 192, at 13.

208. *Id.*

209. *Id.* at 22.

210. *Id.*

211. *See id.* at 8.

212. *Id.* at 8-13.

ness.”²¹³ Then, in an obvious case of self-defense, an individual determined not to become the sixth victim killed the madman.²¹⁴ Normally, the justices would have handled this case (i.e., dismissed), but they were required to refer it to the King.²¹⁵ Hurnard suggests that the king’s screening of homicide cases was in part due to a lack of trust in the justices.²¹⁶

By the late twelfth century, a person charged with homicide would have to appeal to the king for mercy,²¹⁷ but there is significant evidence that pardons were available for the right amount.²¹⁸ In any event, by allowing for the possibility of a pardon, the king was able to give more severe penalties.²¹⁹ The logic was that the constant imposition of stiff penalties without some opportunity for clemency would result in unrest. Over the long-term, this would make it harder for the Normans to rule effectively.

A more uniform body of law and the development of the “common law” also necessarily meant a move away from the mixing of secular and canonical law, as each was becoming increasingly uncomfortable with the church’s role in secular law.²²⁰

As previously discussed, the actual rendering of laws into writing was another important factor in creating uniform English laws. The law books of Granvill and Bracton, while not constituting binding precedent, created a model of legal and judicial thinking. Along with new English law books came the increased use and writing of pleas and rolls. On the one hand, these developments were liberating for judges. As the common law developed, it became the province of those schooled in it to improve it. On the other hand, a written record of an increasingly centralized and uniform law structurally reduced the number of choices from which a judge had to choose. No longer could a judge pick from canonical law to reach a result; no longer, as the common law gained stronger roots, could a judge make a decision “willy-nilly.” The law books provided a standard against which judicial decisions—the exercise of discretion—were measured.

213. *Id.* at 25.

214. *Id.*

215. *Id.*

216. *Id.* at 26.

217. *Id.* at 8.

218. *Id.* at 17.

219. *Id.* at 13-14.

220. See TURNER, *supra* note 193, at 40-44.

2. The Jury

Although the development of the modern jury was still years away in the eleventh, twelfth, and early thirteenth centuries, its close cousin was emerging. From the *Assize of Clarendon* came the first significant change in the composition and role of the jury in England.²²¹ The jury was, and would develop further into, a body by which primary judicial discretion would be limited. Like juries of today, these juries were concerned with factual matters, which reduced judicial discretion. This reduction of judicial discretion was not by accident, as evidenced by the conflict between secular and canonical law. Juries were used where there was some disagreement between the two: "Church and state are at issue, and neither should be judge in its own cause."²²²

The first jury to hear a case and decide the factual issues did not always have the last word, however. The jury of attain was a powerful tool by which the court could reexamine the evidence or facts of the case. "Under the theory that the trial jury may have 'willfully falsified' their verdict, an attain jury was summoned to decide whether the first jury had perjured themselves."²²³ If the second jury decided that the first jury had perjured itself, the judge would impose stiff penalties on the attainted jury, such as forfeiture of their goods and chattels, loss of their lands to the king, ejectment of their wives and children from their homes, and payment of a fine.²²⁴ Additionally, since the original party to the case was a party along with the suspect jury, the original party also had to pay a fine.²²⁵

Just the threat of an attain meant the judge wielded a significant amount of power in shaping the outcome of a case. While the writ of attain was originally only granted by leave of the king, its use was later given to the discretion of the judges.²²⁶ As one commentator has noted: "Fortunately, the doctrine of jury attain is no longer around for judges to use to bludgeon jurors into being other

221. SHAPIRO, *supra* note 127, at 77-78.

222. POLLOCK & MAITLAND, *supra* note 124, at 144-45.

223. Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 509-10 (1995) (quoting JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 137 (1898)).

224. *Id.* at 510; David Millon, *Positivism in the Historiography of the Common Law*, 1989 WIS. L. REV. 669, 686-87 (1989).

225. Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 37 n.44 (1994).

226. *Id.*

than independent and impartial finders of fact.”²²⁷ Even though juries could be attainted, the role of the jury was nevertheless structurally designed to limit primary judicial discretion.

3. Appellate Review

Appellate review did not exist for medieval judges the way we conceive of it today. An “appeal” in medieval England was actually a charge against the judge, personally, for the decision reached in a case. There was no right to appeal and no formalized structure. Only in certain circumstances did appealing act as a mechanism for righting “miscarriages of justice.”²²⁸ Even though the parties did not always have the opportunity to appeal, some county courts would seek advice from the royal court in Westminster if the county court had a particularly difficult case.²²⁹

Given that appeal was neither a uniformly available nor a widely used procedure, it is better to think of those appeals that did occur as ad hoc limits on discretion, as opposed to structural limits on secondary discretion. Therefore, appeals hardly constituted the same kind of mechanism that would in turn affect judicial decision-making in the way we now think of them.²³⁰ Nevertheless, appellate review as it existed in medieval England still remained a primary and secondary discretion-limiting mechanism.

4. Jurisdiction as a Limitation on Discretion

Jurisdiction was then, as it is now, a significant limitation on judicial discretion. In some cases the limitation was structural. As the court system was centralized, the king was able to divide up the work to different types of courts. In addition to the king’s courts, including the itinerant justices, there were courts like the “justices of the Jews,” which were concerned solely with the issues arising out of the Jewish money-lending industry.²³¹ As Ralph Turner

227. Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall & Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 165-66 (1988).

228. HARDING, *supra* note 163, at 38-39.

229. POLLOCK & MAITLAND, *supra* note 124, at 185.

230. See, e.g., Hon. Ann Claire Williams, Speech at University of Wisconsin Law School (Feb. 23, 2004) (notes of speech on file with author). Speaking about her fifteen years as a district court judge in Chicago, Illinois, Judge Williams mentioned that when deciding a close case, she had an eye on whether the Seventh Circuit Court of Appeals would likely reverse her decision. If reversal was likely, it affected her decision-making. *Id.*

231. TURNER, *supra* note 193, at 41.

notes, judges also knew there were limits on which matters they should be deciding and which ones were best left to the king.²³² This type of behavior, while not necessarily imposed by the king, acted as a limitation on those judges' discretion to handle certain types of cases, or make certain types of rulings.

Some of the jurisdictional limitations were not structural, but rather operated on an individual basis. Itinerant justices, for example, could be given very limited-purpose appointments.²³³ Purpose-based limitations acted in concert with structural limitations to significantly restrict judicial discretion. The king could maintain strict control over the behavior of the justices by expanding or limiting the justices' jurisdiction on an individual basis.

III. TRANSFERABLE CONCEPTS AND LESSONS

In comparing federal judicial discretion in twenty-first century America with medieval England, we see that many of the mechanisms that now operate to limit primary and secondary judicial discretion have their roots in the tumultuous period immediately following the Norman Conquest. Further, both Congress and kings took specific actions with the goal of limiting judicial discretion in reaction to events of the day. Often, these specific reactions have been attempts to legitimize the sovereign's authority to rule.

Congress' reaction to the continuous challenges to the Sentencing Guidelines as manifested by the systemic downward departures, was to enact the Feeney Amendment. In Congress' eyes, downward departures were an affront to the crime-sanctioning power of Congress, and therefore of the United States. Instead of looking to address the underlying issues (i.e., possibly faulty guidelines), Congress sought to alter the level of judicial discretion to resolve the turmoil. Similarly, Congress reacted in a "knee-jerk" fashion when it changed the sentences for white-collar crimes, even though the committee tasked with recommending sentences did not think longer sentences were necessary.

Congress limited federal judges' primary and secondary discretion through specific enactments—not unlike the kings' *Assizes*—and further sought to influence judicial behavior by strengthening its physical presence (the subpoena mechanism). This practice is not unlike the tactic of King John who, in his quest to centralize power, kept his royal court under close scrutiny out of fear and

232. *Id.* at 39.

233. *Id.* at 30.

suspicion.²³⁴

In looking at the period following the Norman Conquest, we see the beginnings of structural limitations being put in place as kings experimented with maintaining centralized control over government and the administration of justice. For many of the same reasons, those structural limitations persist in the U.S. legal system.

Four main structural limitations originating in medieval England between 1066 and 1215 survive. First, following the *Assize of Clarendon*, the jury began to limit the scope of judicial fact-finding. As a discretion-limiting mechanism, the jury persists today, although admittedly in twenty-first century America this function of the jury is becoming increasingly less relevant.

Second, the Norman Kings put significant *jurisdictional limitations* on early judges as a way of controlling them. Congress continues to impose significant jurisdictional limitations (subject matter and personal) on federal court judges, thereby restricting their primary discretion.

Third, the concerted effort to move from local justice and custom to a *centralized court system* with a “common law” and the moving away from canonical law as a way of solidifying royal power and justice, resulted in centralized courts. In twenty-first century America, the federal trial courts are centralized under one Supreme Court and twelve courts of appeals. Via appellate review and statutes, Congress continues to create a uniform body of law for those courts to apply in concert at the will of Congress.

Finally, although modern notions of *appellate review* were sporadic in medieval England, appellate review has become one of the defining features of the American legal system. It now operates as a structural mechanism to limit secondary discretion.

These structural limitations were established as a way of restraining the judiciary and cementing the strength and legitimacy of the king. Spot measures used by the king, and now Congress, (e.g., *Assizes* or the Feeney Amendment) reduce primary judicial discretion. Even though U.S. federal judges have some protections against a complete scuttling of their discretion, spot measures and structural limitations act together to perform many of the same discretion-limiting functions as they did eight to ten centuries ago. While a measure of discretion has been restored as a result of

234. *Id.* at 43-44.

Blakely and *Booker*, Congress is sure to react to limit discretion once again.

The most important lesson for Congress looking forward may be a cautionary one, and it is hard to improve on a popular quote: "Those who cannot remember the past are condemned to repeat it."²³⁵ At the very least, "[t]hose who do not remember [the past] are in jeopardy of suffering at the hands of those who say they do."²³⁶ The U.S. Constitution sets up a unique structure that is designed to ensure judicial independence. Despite the Founders' desire to establish an independent judiciary, many of the same structural limitations on judicial discretion that existed in medieval England remain present in the U.S. federal system.

The increasing number of discretion-limiting statutory enactments, such as Congress' limitations in the realm of sentencing, make our current federal judges' discretion look more and more like the discretion wielded by medieval English judges. That will again likely be true when Congress reacts to *Booker*. The examination by subpoena of individual judges' sentencing decisions is not unlike the king bringing an itinerant justice back to Westminster to review the justice's actions on eyre. Likewise, when the king dismissed itinerant justices for over-enforcing his laws, he sent a strong message. Will Congress do the same by impeaching a judge who continues to downward-depart in the face of the Feeney Amendment?

It is important to understand the historical reasons for judicial discretion—or the lack of it—before we start chipping away at what discretion U.S. federal district court judges still have, both before, and now after, *Booker*. The more judicial discretion is removed, the more judges will become Congress' servants.

Before any steps are taken to replace or modify the Guidelines, thereby again restricting judges' sentencing discretion, it would be wise to understand why judges need discretion as they perform their valuable role in our society. Rushing to replace or modify the Guidelines without appreciating the possible consequences will likely lead to disastrous results.

Judges in medieval England were in many respects merely the

235. GEORGE SANTAYANA, *THE LIFE OF REASON OR PHASES OF HUMAN PROGRESS* 284 (New York 1920).

236. Herbert Butterfield, *The Dangers of History*, reprinted in *THE VITAL PAST: WRITINGS ON THE USES OF HISTORY* 1, 11 (S. Vaughn ed., 1985); see also Maxwell, *supra* note 59, at B2 (Tom Feeney saying about himself: "I am here to say that I think Tom Feeney knows more about the Constitution than some of our federal judges.").

servants of the king, but even the Norman kings understood that unbending enforcement of stiff penalties was counter-productive on a number of fronts. Long-term enforcement without some opportunity for clemency results in unrest. The possibility of a pardon gave the king the freedom to impose stiffer penalties and judges could attainturies they thought had misapplied the facts. Congress seems to have forgotten these lessons.

By taking action that further limits judicial discretion, Congress runs the risk that modern judges will have little more discretion than medieval English judges had. Given our Founders' desire to separate themselves from England when the Constitution was written, and by providing three separate branches of government, it is unlikely they wished Congress to reestablish severe limits on judicial discretion. Whether mandatory federal sentencing schemes are reincarnated or not, we should continue to question the wisdom of further limiting judicial discretion.

CONCLUSION

The Norman kings both used structural mechanisms and specific measures to limit both the primary and secondary discretion of judges. Many of the mechanisms that now operate to limit federal judges' discretion have their roots in post-Conquest England between 1066 and 1215. Specifically, the creation of uniform laws vested in one system of courts, the jury, the appellate process, and jurisdiction, all operated then, as they do now, to limit judicial discretion.

We should question the wisdom of recent and future congressional attempts to limit the sentencing discretion of federal judges, as the more judges are reined in by Congress, the more they resemble the king's justices. More importantly, we should be concerned with a continued erosion of judicial discretion without understanding its historical underpinnings. The king's justices had very limited discretion and were largely beholden to the king; it is difficult to imagine the Founders envisioning a similarly servile role for U.S. federal judges.